

Virginia. Unlike most scenarios presumed by the FCC in the 700 MHz proceeding, WUPV would not terminate NTSC operation after vacating Channel 65. Rather, WUPV would continue NTSC operation on Channel 52 in addition to DTV operation on its allotted DTV Channel 47. Further, Channel 65 is the *only used TV allotment within the 700 MHz band* in the Richmond-Petersburg, Virginia market.¹² Allowing substitution of NTSC Channel 52 for NTSC Channel 65 would thus clear the way for the early implementation of new wireless and public safety services in this important market. Accordingly, under the Commission's standards, substantial public interest benefits can be presumed from a grant of the instant request to permit WUPV to move from Channel 65 to Channel 52.

5. Petitioner herein states its present intention to apply for Channel 52. Petitioner recognizes that the instant request is made without knowing the market winner of the 700 MHz auction, which is currently scheduled to begin on March 6, 2001,¹³ and without the financial benefit of having entered into a voluntary band clearance agreement with a new 700 MHz licensee. Should the Commission not resolve the instant proceeding by the conclusion of the 700 MHz auction, Petitioner herein reserves the right to enter into a band clearance agreement with a new 700 MHz

¹² See Television & Cable Factbook 2000, at A-1227. In addition to NTSC Channel 65, NTSC Channel 63 is the only other 60-69 allotment in the Richmond market; however, Channel 63 is an unuseable allotment since the Commission will no longer grant authority for operation on channels 60-69. See *Allotment Petitions Public Notice*. Accordingly, no station will ever be granted authority to operate on Channel 63 in Richmond, and thus, Petitioner's Channel 65 allotment is in fact the only 60-69 allotment in Richmond that now can ever be used by a television station.

¹³ Auction of Licenses for the 747-762 and 777-792 MHz Bands Postponed Until March 6, 2001, *Public Notice*, FCC 00-282 (rel. July 31, 2000).

licensee which could have the added benefit of providing remuneration that could help defray Petitioner's costs in implementing DTV service.

6. For the above reasons, Petitioner respectfully requests that the Commission adopt and release a Notice of Proposed Rule Making, proposing to amend the NTSC TV Table of Allotments by deleting NTSC Channel 52 at Courtland, Virginia, and substituting NTSC Channel 52 for NTSC Channel 65 at Ashland, Virginia. Thereafter, Petitioner respectfully requests that the Commission adopt and release a Report and Order amending the NTSC TV Table of Allotments as follows:

Community	Present Allotments	Proposed Allotments
Ashland, VA	65+	52
Courtland, VA	*52	

Respectfully submitted,

BELL BROADCASTING, L.L.C.

By: 

Mark J. Prack

By: 

David Kushner

By: 

Coe W. Ramsey

Counsel to Bell Broadcasting, L.L.C.

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November 3, 2000

EXHIBIT A

ENGINEERING STATEMENT

The engineering data contained herein have been prepared on behalf of BELL BROADCASTING LLC, licensee of WUPV(TV), Channel 65 in Ashland, Virginia, in support of its Petition for Rulemaking to substitute NTSC Channel 52 for WUPV's NTSC Channel 65 in Ashland, Virginia.

Due to the imminent FCC auction of the Channel 65 spectrum to wireless communications services, the licensee of WUPV desires to vacate the present NTSC channel as soon as possible. Our detailed channel search reveals that NTSC Channel 52 meets the Commission's analog spacing requirements of §73.610, as well as the DTV interference criteria of §73.623(c). Deletion of the unused NTSC Channel 52 allotment in Courtland, Virginia, is required in order to make Channel 52 available in Ashland, Virginia.

Exhibit B-1 is an NTSC spacing study for the new Channel 52 allotment in Ashland, based on the reference coordinates for this community (37° 45' 31" N, 77° 28' 49" W). As shown, the only shortspacings involve WMAR-DT, Channel 52 in Baltimore, Maryland; the unused NTSC Channel 52 allotments in Courtland, Virginia, and Cumberland, Maryland; and WCVW(TV), Channel 57 in Richmond, Virginia. It is requested that the new Channel 52 allotment in Ashland be site-restricted to an area at least 11 kilometers east of the Ashland reference coordinates in order to protect the Cumberland allotment and WCVW. Exhibit B-2 is another spacing study, this time using the licensed site of WUPV(TV). As shown, the only short-spacing issues are with respect to the vacant

EXHIBIT A

Channel 52 assignment in Courtland, Virginia, and to WMAR-DT on Channel 52 in Baltimore, Maryland.

Although we request the deletion of the unused Courtland allotment, it is important to note that there is a pending application for this assignment (BNPET-19960923ABC). However, the applicant, Community Television Educators, tendered the proposal after the cutoff date set by the Commission for the filing of applications for new NTSC television services. Therefore, it is believed that BNPET-19960923ABC was not timely filed and must be dismissed by the Commission on procedural grounds.

With respect to potential interference to WMAR-DT, as well as other DTV facilities and allotments, we have analyzed the effect of a proposed NTSC Channel 52 Ashland station on these stations. Under the present circumstances, the FCC's spacing requirements to digital television facilities and allotments do not pertain. Instead, Longley-Rice interference studies are utilized to ensure that the NTSC proposal meets the requirements of Section 73.623(c)(2) of the FCC's Rules (without the benefit of causing *de minimis* levels of interference).

The operating parameters used in the interference study are identical to those of WUPV, except that an effective radiated power of 5000 kw was assumed. A tabulation of the proposed operating parameters is provided in Exhibit C. Exhibit D is an interference study, which concludes that the proposed WUPV facility meets the requirements of §73.623(c)(2) of the Rules with respect to all DTV facilities and allotments.

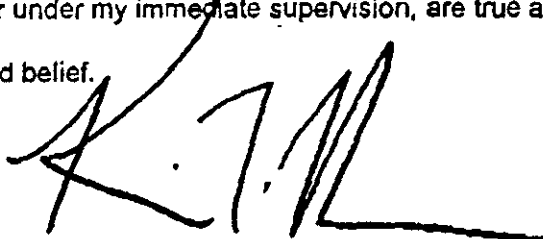
SMITH AND FISHER

EXHIBIT A

It is thus requested that the FCC delete the analog Channel 65 assignment in Ashland, Virginia, and the Channel 52 assignment in Courtland, Virginia, and add NTSC Channel 52 to Ashland for use by WUPV, by changing §73.606(b) of its Table of NTSC Allotments, as follows:

<u>Community</u>	<u>Present Allotments</u>	<u>Proposed Allotments</u>
Ashland, Virginia	65+	52
Courtland, Virginia	*52	

I declare under penalty of perjury that the foregoing statements and the attached exhibits, which were prepared by me or under my immediate supervision, are true and correct to the best of my knowledge and belief.



KEVIN T. FISHER

October 18, 2000

Smith and Fisher
Washington, DC

EXHIBIT B-1

Dataworld Analog TV Spacing Study

Title: Ashland, Virginia
Channel: 52 Zone I (698-704 MHz) Analog

ASHLAND, VIRGINIA
REFERENCE COORDINATES
Latitude: N 37° 45' 31.0"

Database: DW 10/16/2000 5:30:59 PM

Longitude: W 77° 28' 49.0"
Safety Zone: 30.0 km

Call	Auth	Licensee name	Chan	HAAT(m)	ERP	Latitude	Br-to	Dist	Req
City of License		St	FCC File Number	Zone	HAMSL(m)	Longitude	-from	(km)	(km)
WBFF	Lic	Chesapeake Television Licensee,	45 o	385.9	1290	N 39° 20' 10.0"	22.1	189.5	95.70
Baltimore		MD	BLCT-19890526KF	I	495.9	W 76° 38' 59.0"	202.6	93.79	CLEAR
WPXV	CP	Paxson Communications License Co	49 -	344.0	2000	N 36° 49' 51.0"	140.2	133.7	31.40
Portsmouth		VA	BPCT-19960627KK	I	351.0	W 76° 31' 05.0"	320.8	102.3	CLEAR
CP granted 7/24/98 per 44293-7/29/98;									
WBDC-TV	CP	WBDC Broadcasting, Inc.	50 o	262.0	2360	N 38° 57' 00.0"	14.6	136.8	31.40
Washington		DC	BPCT-20000619AEP	I	330.0	W 77° 04' 49.0"	194.9	105.4	CLEAR
CP granted 9/19/2000 per 44826-9/25/2000; EXT 950511DP (23513 5/22/95);									
WBDC-TV	App	WBDC Broadcasting, Inc.	51	274.0	100	N 38° 57' 00.0"	14.6	136.8	106.0
Washington		DC	BPCDT-19990915TL	I	340.0	W 77° 04' 49.0"	194.9	30.79	CLEAR
Digital channel; DTV channel; CP cancelled and call sign deleted per 44089-10/2/97;									
ALLOC			*52 o	0.0	0	N 36° 42' 00.0"	162.3	121.3	248.6
Courtland		VA	II	0.0		W 77° 04' 00.0"	342.6	-127	SHORT
WMAR-TV	DTV	Scripps Howard Broadcasting Comp	52	305.0	1000	N 39° 20' 05.0"	22.1	189.3	217.3
Baltimore		MD	I	389.0		W 76° 39' 03.0"	202.6	-28.0	SHORT
Digital channel; DTV Channel Allotment per MM Doc 87-268 (6th R & O) released 2/19/98;; DA: rep MDBALTIMORE_52 @ 0.0"									
WMAR-TV	Lic	Scripps Howard Broadcasting Comp	52	311.0	602	N 39° 20' 06.0"	22.1	189.3	217.3
Baltimore		MD	BLCDT-19980713KE	I	395.0	W 76° 39' 03.0"	202.6	-28.0	SHORT
Digital channel; DTV channel;									
ALLOC			52 +	0.0	0	N 39° 38' 00.0"	332.5	237.8	248.6
Cumberland		MD	I	0.0		W 78° 45' 48.0"	151.7	-10.8	SHORT
WVNT	Lic	Central Virginia Educational Tel	*53 o	229.0	2290	N 38° 37' 42.0"	2.1	86.61	87.70
Goldvein		VA	BMLET-19901114KE	I	309.0	W 77° 26' 20.0"	182.2	8.906	CLOSE
NEW	App	Hampton University	*55 +	144.0	1000	N 37° 01' 02.0"	128.9	130.5	31.40
Hampton		VA	BPET-19920203KE	I	144.0	W 76° 20' 11.0"	309.6	99.11	CLEAR
WVNC	Lic	Central Virginia Educational Tel	*56 -	223.0	1230	N 38° 52' 28.0"	10.2	125.9	31.40
Fairfax		VA	BLET-19830525KF	I	311.0	W 77° 13' 24.0"	190.3	94.48	CLEAR
WCWV	Lic	Central Virginia Educational Tel	*57 -	293.0	1000	N 37° 30' 46.0"	201.4	29.31	31.40
Richmond		VA	BLET-780828IU	I	360.0	W 77° 36' 06.0"	21.3	-2.09	SHORT
WWPX	Lic	D P Media License of Martinsburg	60 +	300.0	2040	N 39° 27' 27.0"	345.1	195.3	31.40
Martinsburg		WV	BLCT-19960826KG	I	506.0	W 78° 03' 53.0"	164.8	163.9	CLEAR
License granted 6/21/99 per 44517-6/28/99;; DA: DIE ODD980402KG @ 0.0"; Primary station: WPXW Manassas, VA									
WPXW	Lic	Paxson Washington License, Inc.	66 +	168.0	4370	N 38° 47' 16.0"	6.5	115.0	95.70
Manassas		VA	BLCT-19960516KE	I	255.0	W 77° 19' 49.0"	186.6	19.29	CLEAR

EXHIBIT B-2

WUPV(TV) SITE

Latitude: N 37° 44' 31.0"

Longitude: W 77° 15' 15.0"

Safety Zone: 30.0 km

Call City of License	Auth	Licensee name St	FCC File Number	Chan Zone	HAAT(m) HAMS L(m)	ERP (kW)	Latitude Longitude	Br-to -from	Dist (km)	Req (km)
WBFF Baltimore	Lic	Chesapeake Television Licensee, MD	BLCT-19890526KF	45 o 1	385.9 495.9	1290	N 39° 20' 10.0" W 76° 38' 59.0"	16.3 196.7	184.6 88.94	95.70 CLEAR
WPXV Portsmouth	CP	Paxson Communications License Co VA	BPCT-19960627KK	49 - 1	344.0 351.0	2000	N 36° 49' 51.0" W 76° 31' 05.0"	147.0 327.5	120.4 88.96	31.40 CLEAR
CP granted 7/24/98 per 44293-7/29/98;										
WBDC-TV Washington	CP	WBDC Broadcasting, Inc. DC	BPCT-20000619AEP	50 o 1	262.0 330.0	2360	N 38° 57' 00.0" W 77° 04' 49.0"	6.4 186.5	135.0 103.6	31.40 CLEAR
CP granted 9/19/2000 per 44826-9/25/2000; EXT 950511DP (23513 5/22/95);										
WBDC-TV Washington	App	WBDC Broadcasting, Inc. DC	BPCDT-19990915TL	51 1	274.0 340.0	100	N 38° 57' 00.0" W 77° 04' 49.0"	6.4 186.5	135.0 28.95	106.0 CLEAR
Digital channel; DTV channel; CP cancelled and call sign deleted per 44089-10/2/97;										
ALLOC Courtland		VA		*52 o 11	0.0 0.0	0	N 36° 42' 60.0" W 77° 04' 00.0"	171.7 351.8	115.0 -134	248.6 SHORT
WMAR-TV Baltimore	DTV	Scripps Howard Broadcasting Comp MD		52 1	305.0 389.0	1000	N 39° 20' 05.0" W 76° 39' 03.0"	16.3 196.7	184.5 -32.8	217.3 SHORT
Digital channel; DTV Channel Assignment per MM Doc 87-268 (6th R & O) released 2/19/98;; DA: rep MDBALTIMORE_52 @ 0.0°										
WMAR-TV Baltimore	Lic	Scripps Howard Broadcasting Comp MD	BLCDT-19980713KE	52 1	311.0 395.0	602	N 39° 20' 06.0" W 76° 39' 03.0"	16.3 196.7	184.5 -32.8	217.3 SHORT
Digital channel; DTV channel;										
ALLOC Cumberland		MD		52 + 1	0.0 0.0	0	N 39° 38' 60.0" W 78° 45' 48.0"	328.8 147.8	249.2 0.600	248.6 CLOSE
WVNT Goldvein	Lic	Central Virginia Educational Tel VA	BMLET-19901114KE	*53 o 1	229.0 309.0	2290	N 38° 37' 42.0" W 77° 26' 20.0"	350.8 170.6	99.71 12.01	87.70 CLOSE
NEW Hampton	App	Hampton University VA	BPET-19920203KE	*55 + 1	144.0 144.0	1000	N 37° 01' 02.0" W 76° 20' 11.0"	134.5 315.1	114.4 82.96	31.40 CLEAR
WVNC Fairfax	Lic	Central Virginia Educational Tel VA	BLET-19830525KF	*56 - 1	223.0 311.0	1230	N 38° 52' 28.0" W 77° 13' 24.0"	1.2 181.2	125.7 94.34	31.40 CLEAR
WCVV Richmond	Lic	Central Virginia Educational Tel VA	BLET-780828IU	*57 - 1	293.0 360.0	1000	N 37° 30' 46.0" W 77° 36' 06.0"	230.3 50.1	39.85 8.450	31.40 CLOSE
WWPX Martinsburg	Lic	D P Media License of Martinsburg WV	BLCT-19960826KG	60 + 1	300.0 506.0	2040	N 39° 27' 27.0" W 78° 03' 53.0"	340.0 159.5	203.1 171.7	31.40 CLEAR
License granted 6/21/99 per 44517-6/28/99;; DA: DIE ODD980402KG @ 0.0°; Primary station: WPXW Manassas, VA										
WPXW Manassas	CP	Paxson Washington License, Inc. VA	BPCT-20000215AAR	66 + 1	190.0 275.5	3400	N 38° 47' 16.0" W 77° 19' 47.0"	356.8 176.7	116.3 20.57	95.70 CLEAR
CP granted 5/8/2000 per 44738-5/19/2000; REINST. FOR FT. CP EXT RECD 3-25-93 PER FCC INVEN 7-16-93;										

EXHIBIT C

PROPOSED OPERATING PARAMETERS

PROPOSED WUPV(TV)
CHANNEL 52 - ASHLAND, VIRGINIA

Channel Number:	52z
Zone:	1
Site Coordinates:	37-44-32 77-15-15
FCC Tower Registration Number:	1035293
Tower Site Elevation (AMSL):	29 meters
Overall Tower Height Above Ground:	273 meters
Overall Tower Height Above (AMSL):	302 meters
Effective Antenna Height Above Ground:	266 meters
Effective Antenna Height (AMSL):	295 meters
Average Terrain Elevation (2-10 miles):	33 meters
Effective Antenna Height Above Average Terrain:	262 meters
Antenna Make and Model:	Andrew ATW25H3- HTC3-52S
Orientation:	225°T
Electrical Beam Tilt:	0.75°
Polarization:	Horizontal
Effective Radiated Power (main-lobe, maximum):	5000 kw

EXHIBIT D-1

ALLOCATION AND INTERFERENCE STUDY

PROPOSED WUPV(TV)
CHANNEL 52 - ASHLAND, VIRGINIA

The NTSC spacing study in Exhibit B-2, using the site coordinates of WUPV(TV), concludes that the proposed Channel 52 facility meets all spacing requirements of Section 73.610 of the FCC Rules with respect to other NTSC facilities, authorizations and assignments (except for that to the Courtland allotment, the deletion of which is proposed in this petition.)

Since predicted interference rather than separation requirements to DTV facilities pertains to this petition, an interference study was then conducted using the operating parameters of the proposed WUPV(TV) facility described in Exhibit C to determine if it meets the DTV interference requirements of Section 73.623(c)(2) of the Commission's Rules. Specifically, the proposed facility must cause less than 0.5 percent interference to the service population of an authorized or proposed DTV station or to its corresponding allotment facility.

The service area of a DTV station is defined as that which is calculated using the Longley-Rice propagation model to receive a signal of 41 db μ or greater and lies within the predicted 41 db μ contour of the station, based on using the FCC's F(50,90) curves, the station's effective radiated power, and 2-10 mile terrain averages along each of the cardinal radials.

In evaluating the interference effect of this proposal, we have relied upon the V-Soft Communications "Probe" computer program, which has been found generally to mimic the FCC's program. Changes in interference caused by the addition of WUPV on Channel 52 to pertinent DTV stations are tabulated in Exhibit D-2.

As indicated, the proposed WUPV facility contributes less than 0.5 percent interference to the service population of all potentially affected DTV stations. In addition, we

EXHIBIT D-1

have determined that the proposed WUPV allotment will not affect any Class A-eligible LPTV station.

Therefore, this proposal meets the FCC's interference standards as defined in Section 73.623(c) of the Commission's Rules.

EXHIBIT D-2

DTV INTERFERENCE ANALYSIS
PROPOSED WUPV(TV)
CHANNEL 52 - ASHLAND, VIRGINIA

INTERFERENCE LOSSES (POPULATION)							
<u>DTV Call Sign</u>	<u>City, State</u>	<u>Ch.</u>	<u>41 dbu Service Population (Longley-Rice)</u>	<u>NTSC & DTV Without Ashland</u>	<u>NTSC & DTV With Ashland</u>	<u>Unmasked Ashland</u>	<u>% of DTV Service Population*</u>
WTVD-DT (Allot)	Durham, NC	52	2,408,667	101,951	105,532	3,581	0.1
WTVD-DT (CP)	Durham, NC	52	2,354,283	76,514	79,017	2,503	0.1
WTVD-DT (LIC)	Durham, NC	52	2,132,543	92,028	94,365	2,337	0.1
WMAR-DT (LIC)	Baltimore, MD	52	6,724,088	459,654	475,211	15,557	0.2
WMAR-DT (Allot)	Baltimore, MD	52	7,495,443	664,440	692,367	27,927	0.4

* Must be less than 0.5%, under FCC *de minimis* interference standards.

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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Clay Pendarvis, Chief
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Mass Media Bureau
Federal Communications Commission
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Washington, D.C. 20554

This the 8th day of November, 2000.

Sandra S. Kupe

Exhibit B

RECEIVED

JAN 10 2001

**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY**

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
United Television, Inc.)	File No. BPCT-960920IT
)	
Television Capital Corporation of Richmond)	File No. BPCT-960920WI
)	
For Construction Permit for a New Television)	
Broadcast Station on Channel 63 in)	
Richmond, Virginia)	

**MOTION FOR LEAVE TO FILE
SUPPLEMENT TO OPPOSITION OF BELL BROADCASTING TO
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT AND
RESPONSE TO JOINT REPLY OF
UNITED TELEVISION AND TELEVISION CAPITAL CORPORATION**

Bell Broadcasting, L.L.C., licensee of Television Station WUPV, Ashland, Virginia ("WUPV"), by its attorneys, hereby moves for leave to supplement its Opposition to the Joint Request for Approval of Settlement Agreement filed by United Television, Inc. ("United") and Television Capital Corporation of Richmond ("TCC") in the above-captioned matters and, further, to respond to the Joint Reply to Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement ("Joint Reply") filed by United and TCC on December 22, 2000. In support of this motion for leave to file a Supplement and Response, WUPV states the following:

One week after WUPV filed its Opposition, the Commission released its decision in *Channel 32 Hispanic Broadcasters, Ltd.*, FCC 00-380, released November 15, 2000 ("*Channel 32*"). *Channel 32* holds that where there are two pre-July 1, 1997, applications and one is facially unacceptable, the Commission is required to accept competing applications and to resolve the applications using competitive bidding. This decision is controlling precedent in the instant case, as explained in the accompanying Supplement and Response. Although United and TCC did not

file their Joint Reply until December 22, 2000, more than one month after the Commission's release of *Channel 32*, the Joint Reply contains no mention of this controlling authority.

The Joint Reply also contains a blatant mischaracterization of WUPV's principal argument that TCC failed to include a *substantive* freeze waiver request, as required by the Commission's 1987 Freeze Order,¹ when it submitted its application in File No. BPCT-960920WI. Because WUPV's argument goes straight to the heart of what has now been definitively resolved in *Channel 32*, it is necessary to respond to United and TCC's misrepresentation of WUPV's argument.

Therefore, for the above-stated reasons, good cause exists to permit WUPV to file the accompanying Supplement and Response, and WUPV respectfully requests that this Motion be granted.

¹ See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, *Order*, Mimeo No. 4074 (released July 17, 1987) ("Freeze Order").

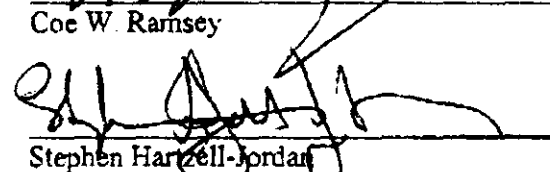
Respectfully submitted,

Bell Broadcasting, L.L.C.



Mark J. Brak

David Kushner

Coe W. Ramsey

Stephen Hartzell-Jordan

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Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

January 10, 2001

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In re Applications of)	
)	
United Television, Inc.)	File No. BPCT-960920IT
)	
Television Capital Corporation of Richmond)	File No. BPCT-960920WI
)	
For Construction Permit for a New Television)	
Broadcast Station on Channel 63 in)	
Richmond, Virginia)	

**SUPPLEMENT TO OPPOSITION OF BELL BROADCASTING TO
JOINT REQUEST FOR APPROVAL OF SETTLEMENT AGREEMENT AND
RESPONSE TO JOINT REPLY OF
UNITED TELEVISION AND TELEVISION CAPITAL CORPORATION**

Bell Broadcasting, L.L.C., licensee of Television Station WUPV, Ashland, Virginia ("WUPV"), by its attorneys, hereby supplements its Opposition to the Joint Request for Approval of Settlement Agreement ("Joint Request") filed by United Television, Inc. ("United") and Television Capital Corporation of Richmond ("TCC") in the above-captioned matters and, further, responds to the Joint Reply to Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement ("Joint Reply") filed by United and TCC on December 22, 2000.

Introduction

In their Joint Request, filed July 17, 2000, TCC and United seek the Commission's approval of a settlement agreement, the dismissal of United's application, and the grant of TCC's amended application for a construction permit for a new television broadcast station allotted to Channel 63 in Richmond, Virginia. The Joint Request is premised on the fact that both TCC and United submitted applications for construction permits for the vacant NTSC allotment on Channel 63 in Richmond on September 20, 1996.

On November 8, 2000, WUPV filed an Opposition to United and TCC's Joint Request, stating that because TCC's initial application in FCC File No. BPCT-960920WI ("Channel 63 Application") failed to include a substantive request for a waiver of the Commission's 1987 Freeze Order,² TCC's Channel 63 Application is facially unacceptable. WUPV's Opposition further maintains that the absence of such a substantive waiver request is a fatal and incurable defect in TCC's Channel 63 Application, leaving the Commission no option but to reject it summarily. Such rejection leads to two inexorable conclusions: first, the Commission must dismiss United and TCC's Joint Request; and second, the Commission must open a cut-off window to permit competitive bidding for the Richmond analog allocation.³

On December 22, 2000, United and TCC filed a Joint Reply to the Opposition. This Joint Reply affirmatively mischaracterizes the principal argument WUPV set forth in its Opposition and ignores a recent Commission decision, released after WUPV filed its Opposition, that controls here. Hence the need to supplement the Opposition and to respond to the Joint Reply.

In this Supplement and Response, therefore, WUPV first discusses the failure of United and TCC's Joint Reply to address the main thrust of WUPV's Opposition, that TCC's Channel 63 Application is facially unacceptable and fatally deficient. Second, WUPV discusses *Channel 32*

² See *Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, RM-5811, *Order*, Mimeo No. 4074 (released July 17, 1987) ("Freeze Order").

³ As WUPV pointed out in its Opposition, it is only necessary for the Commission to reach these matters if the Commission does not issue an order consistent with WUPV's Petition for Rule Making, filed November 3, 2000, in which it requested that the Commission delete the vacant allotment for Channel 52 at Courtland, Virginia, and substitute Channel 52 at Ashland, Virginia, for use by WUPV in place of WUPV's current allotment on Channel 65 at Ashland, Virginia, so that the spectrum in channels 60-69 may be cleared as expeditiously as possible to make way for other uses of this spectrum. See WUPV Opposition at 2.

Hispanic Broadcasters, Ltd., FCC 00-380, released November 15, 2000⁴ (“*Channel 32*”), which held that where there are two pre-July 1, 1997, applications and one is facially unacceptable, the Commission is required to accept competing applications and to resolve the applications using competitive bidding.

Argument

I. United and TCC’s Joint Reply Mischaracterizes and Ignores WUPV’s Argument That TCC’s Channel 63 Application Is Fatally Defective for Its Failure to Include a Substantive Freeze Waiver Request

In its Opposition, WUPV argues that TCC’s Channel 63 Application must be summarily rejected because no *substantive* freeze waiver request accompanied it as required by the Commission’s 1987 Freeze Order.⁵ United and TCC’s Joint Reply flatly mischaracterizes this argument and dismisses it in a brief two-paragraph discussion that fails to mention both the real argument itself and the Commission’s requirement that a freeze waiver request be substantive in nature.⁶ Thus, just as TCC apparently misunderstands the nature of a freeze waiver request, the Joint Reply likewise fundamentally misrepresents the crux of WUPV’s argument, despite the Opposition’s seventeen references to the “substantive” waiver request requirement established by the Commission and eight references to the “compelling” reasons that must be demonstrated as the *sine qua non* to

⁴ The release date is significant for two reasons. First, WUPV filed its Opposition on November 8, 2000, one week prior to the release of the *Channel 32* decision. Thus, WUPV could not have addressed the case and its relevance in its Opposition. Second, United and TCC’s Joint Reply was filed December 22, 2000, more than a month after the release of the *Channel 32* decision, and, thus, the Joint Reply could and should have addressed the case—but did not.

⁵ See WUPV Opposition at 5-8.

⁶ See United and TCC Joint Reply at 3-4.

the Commission's granting such a request.⁷

Instead of focusing on the crucial issue—whether TCC, in its Channel 63 Application, submitted a substantive freeze waiver request demonstrating compelling reasons why it should be granted—the Joint Reply merely reiterates the facially inadequate and fatally deficient language set forth in TCC's Channel 63 Application: “a waiver is hereby requested.”⁸ In light of this language alone, TCC and United contend that WUPV's demonstration that TCC failed to submit a substantive waiver request does not “survive[] even superficial scrutiny.”⁹ To the contrary, WUPV respectfully submits that it is TCC's Channel 63 Application that does not—and cannot—survive even “superficial scrutiny,” for TCC's application plainly does not, in fact, contain a substantive freeze waiver request.

The full text of TCC's purported freeze waiver request reads as follows:

This application is in contravention of the ATV “Freeze Order” (RM #5811, adopted July 16, 1987) in that it specifies a less than minimum distance from the protected city. However, the applicant believes that a grant of the instant application will not preclude the use of this channel in Washington, DC and a waiver is hereby requested. A full detailing will be presented as an amendment to this application.¹⁰

That the Joint Reply holds out this paragraph to be a freeze waiver request as contemplated by the Commission's 1987 Freeze Order incorrectly suggests that the “substantive” freeze waiver request

⁷ WUPV is not suggesting, either in its Opposition or in the instant Supplement and Response, that it is appropriate to evaluate whether the reasons given by TCC for the freeze waiver request are “compelling.” Indeed—and this point is crucial—the Commission could not make such an evaluation, as the Commission cannot evaluate that which does not exist.

⁸ United and TCC Joint Reply at 3 (quoting TCC Channel 63 Application, Engineering Report, ¶ 13).

⁹ United and TCC Joint Reply at 3.

¹⁰ TCC Channel 63 Application, Engineering Report, ¶ 13.

requirement is a mere formality. The Joint Reply would have the Commission believe that so long as an applicant simply adverts to the existence of the freeze waiver requirement—that much, admittedly, TCC has done—no more is required. However, the mere advertence to a waiver request requirement is never the equivalence of compliance with such a requirement as the Commission's rules make clear. See 47 C.F.R. § 73.3566(a) (“Applications which are determined to be patently not in accordance with the FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for waiver, will be considered defective and will not be accepted for filing or if inadvertently accepted for filing will be dismissed. Requests for waiver shall show the nature of the waiver or exception desired and *shall set forth the reasons in support thereof.*” (emphasis added)).

United and TCC's Joint Reply not only trivializes the important substantive requirement established in the Freeze Order but also contradicts the very language of TCC's alleged freeze waiver request itself. As TCC stated in its Channel 63 Application, it would present “[a] full detailing [of the freeze waiver request] . . . as an amendment to this application.”¹¹ But as WUPV observed in its Opposition, “a ‘full detailing’ has never been provided; indeed *no* details have ever been provided.”¹² Nonetheless, in their Joint Reply, TCC and United contend—in a footnote—that the engineering portion of their Joint Request “confirm[s] that the digital market in Washington, D.C. would be unaffected by the allocation of Channel 52 to Richmond, Virginia” and that “[a]s the Freeze Order was originally implemented only in order to protect the planned digital transition, this showing that the purpose of the Freeze Order will be unaffected by grant of the Applicants' current

¹¹ *Id.*

¹² WUPV Opposition at 6.

proposal is itself a persuasive reason for waiver of the Freeze Order.”¹³

The Joint Reply’s footnote illustrates precisely TCC’s hopeless confusion of the issues: At this stage of the proceeding it is irrelevant whether a freeze waiver request is “persuasive”¹⁴ or whether the Joint Request refers to or includes a freeze waiver request or the reasons a waiver should be granted. What *is* at issue is whether TCC’s Application contained a substantive freeze waiver request “which provide[s] compelling reasons why the freeze should not apply to [its] particular situation.”¹⁵ And TCC’s Application did not do this. In fact, the freeze waiver request in TCC’s Channel 63 Application provided *no* reasons why the freeze should not apply and, as such, was a naked acknowledgment and recitation—*pro forma*—that the Freeze Order was in effect. Thus, a *post hoc* statement in a footnote of the December 22, 2000, Joint Reply, which strings a tightrope between the July 17, 2000, Joint Request and TCC’s September 20, 1996, Channel 63 Application, does not—and cannot—convert an insubstantial freeze waiver request into a substantive waiver request which “provide[s] compelling reasons why the freeze should not apply to [its] particular situation.”

¹³ United and TCC Joint Reply at 3 n.5. Most plainly, the engineering exhibit to United and TCC’s Joint Request is not the “amendment” contemplated by TCC’s Channel 63 Application, for it makes no reference to TCC’s purported freeze waiver request and provides no “details” of the “compelling reasons” that a waiver should be granted. Indeed, TCC has made no further mention of the issue until this Joint Reply, when prompted by WUPV. If this footnote in the December 22, 2000, Joint Reply is the so-called “amendment,” then, at best, it is hopelessly, deficiently late and contains no demonstration of “compelling reasons,” and, at worst, it is indicative that, at the time it submitted its Channel 63 Application, TCC intended to enter into a settlement agreement in contravention of the Commission’s rules.

¹⁴ On this point, WUPV does not concede that a “persuasive” reason is one which rises to the level of the “compelling reason” standard established in the Freeze Order. Moreover, WUPV reserves the right to contest the so-called persuasiveness of the request at the appropriate stage in this proceeding, if necessary.

¹⁵ Freeze Order, ¶ 2.

As WUPV argues in its Opposition,¹⁶ the lack of a substantive waiver request should compel the Commission to reject TCC's application summarily, leaving United as a singleton applicant. As the next section demonstrates, a recent Commission decision, released after WUPV filed its Opposition, forecloses any argument by TCC or United that United is not a singleton applicant.

II. *Channel 32 Controls the Commission's Disposition of United and TCC's Joint Request Because It Compels the Result that the Commission Must Open a Filing Window for Competing Applications, and, Ultimately, Permit Competitive Bidding on the Richmond Allotment*

The Commission's decision in *Channel 32*, released November 15, 2000, construes certain circumstances in which a filing window must be opened so that competing applicants can file against a pre-July 1, 1997, applicant, as a first step towards competitive bidding. Briefly, the salient facts in *Channel 32* are as follows.

On January 2, 1996, Channel 32 Hispanic Broadcasters ("Hispanic") filed an application for a vacant allotment on Channel 32 in Pueblo, Colorado, which required a freeze waiver request. On September 19, 1996, Word of God Fellowship, Inc. ("Word") filed a competing application. This date was one day before the final deadline allowed by the Commission to file applications for new NTSC stations. Unfortunately for Word, its application was submitted with the old filing fee of \$2915 instead of the new filing fee, effective September 12, 1996, of \$3080. Its application was not accepted and was returned on September 25, 1996, due to the lack of the proper filing fee. Therefore, at the time of the September 20, 1996, deadline for the filing of applications for vacant NTSC allotments, Hispanic's application was not technically subject to a competing application.¹⁷

Fifteen months later, in January 1998, Word filed an application for review of its returned

¹⁶ See WUPV Opposition at 8-10.

¹⁷ See *Channel 32*, ¶¶ 2-3.

application. Hispanic and Word then filed a Joint Request for Approval of Universal Settlement Agreement. The Video Services Division denied approval of the settlement agreement on the ground that, because Word's application had been returned, it had no standing to participate in the agreement.¹⁸ However, the Division later reversed itself and approved the agreement based on the fact that at the time the settlement agreement was filed, Word did have a pleading pending before the Commission. On September 21, 1999, the Commission announced that Hispanic's application was accepted for filing and that, because the application was the result of a settlement, no mutually-exclusive applications would be accepted. Three parties filed petitions to deny.¹⁹

The petitioners argued that Hispanic's application must be considered a singleton and thus subject to an open filing window, competing applications, and competitive bidding. Hispanic argued that Word's application was "filed" by the September 20, 1996, deadline and that the fact that it was subsequently dismissed did not render Hispanic's application a singleton.²⁰

The Commission held that Word's application was not properly "filed" and, therefore, that, under the Balanced Budget Act of 1997, there was only one proper applicant on July 1, 1997. The Commission held that "for an application to achieve filed status—a status which confers certain administrative rights on the applicant—requires more than the physical act of delivering a document to the Commission or its lockbox."²¹

¹⁸ See *id.*, ¶ 5. Similarly, in the instant proceeding, since TCC failed to submit a substantive freeze waiver request with its Channel 63 Application, it has no standing to participate in a settlement agreement with United, notwithstanding the Joint Reply's admonitions to the contrary, see United and TCC Joint Reply at 5.

¹⁹ See *Channel 32*, ¶ 6.

²⁰ See *id.*, ¶¶ 13, 15.

²¹ *Id.*, ¶ 18.

Channel 32 is dispositive here. Just as Word failed to submit the proper filing fee, TCC in the instant proceeding failed to submit the required substantive freeze waiver request. Thus, just as an application does not obtain "filed" status when it has been submitted without the proper filing fee, so, too, does an application not obtain "filed" status when it is submitted without the required substantive waiver request. See Freeze Order, ¶ 2; 47 C.F.R. § 73.3566(a). Accordingly, TCC's application is defective on its face and cannot be accepted. Therefore, as in *Channel 32*, on September 20, 1996, only United's application was properly "filed."

Not surprisingly, United and TCC's Joint Reply makes no mention of the *Channel 32* case. TCC and United dismiss the notion of United's singleton's status by arguing that it does not even have to be considered.²² But because TCC's Channel 63 Application lacks a substantive freeze waiver request, the governing precedent of *Channel 32* cannot be dismissed with such cavalier hand-waving. To the contrary, the Commission should rule consistently with *Channel 32* and hold that United's application is a singleton, announce a filing window for competing applications, and resolve the applications using competitive bidding.

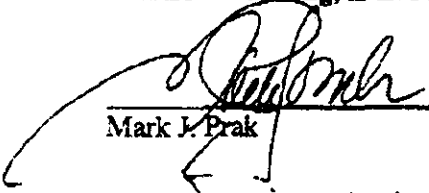
Conclusion

As the foregoing demonstrates, TCC did not file a substantive freeze waiver request with its Channel 63 Application, United and TCC's Joint Reply failed to address this issue, and the recent *Channel 32* case is controlling precedent for resolving the instant proceeding. Because TCC's Application failed to include the substantive freeze waiver request required by the Commission's Freeze Order, *Channel 32* directs that a filing window be opened to provide interested parties with the opportunity to file and, ultimately, to bid competitively against United's singleton application.

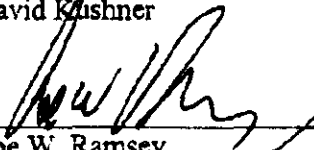
²² See United and TCC Joint Reply at 3-4.

Respectfully submitted,

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January 10, 2001

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Motion for Leave and accompanying Supplement to Opposition of Bell Broadcasting to Joint Request for Approval of Settlement Agreement and Response to Joint Reply of United Television and Television Capital Corporation** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

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